

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHRYN TOWNSEND GRIFFIN, THE ESTATE
OF CHERRIGALE TOWNSEND and THE HELEN
CHRISTINE TOWNSEND MCDONALD TRUST

Plaintiffs,

-against-

EDWARD CHRISTOPHER SHEERAN, p/k/a ED
SHEERAN, ATLANTIC RECORDING
CORPORATION, d/b/a ATLANTIC RECORDS,
SONY/ATV MUSIC PUBLISHING, LLC, and
WARNER MUSIC GROUP CORPORATION, d/b/a
ASYLUM RECORDS

Defendants.

ECF CASE

17-cv-5221 (LLS)

**DECLARATION OF DR.
LAWRENCE FERRARA
IN SUPPORT OF DEFENDANTS’
SEVENTH MOTION *IN LIMINE***

I, LAWRENCE FERRARA, declare as follows:

1. I have personal knowledge of, and am fully familiar with, the facts set forth in this Declaration, which I respectfully submit in support of the Seventh Motion *In Limine* filed by Defendants Edward Christopher Sheeran (“Sheeran”), Atlantic Recording Corporation (“Atlantic”) and Sony/ATV Music Publishing LLC (n/k/a Sony Music Publishing (US) LLC) (“SMP,” together with Atlantic and Sheeran, the “Defendants” and each a “Defendant”), which seeks an Order precluding Plaintiffs from introducing at trial their proposed performance(s) of the *Let’s Get It On* Deposit Copy.

2. While I am advised that Plaintiffs have provided two recordings, identified as Audio Exhibit 1 and Audio Exhibit 2, and annexed to the accompanying Declaration of Donald S. Zakarin, given that those two recordings differ from each other and from the Deposit Copy, there is no way to know what Plaintiffs’ proposed performance at trial will be. But, given that Audio Exhibit 1 and Audio Exhibit 2 differ significantly from the Deposit Copy, if Plaintiffs’ proposed

performance is anything similar to either of these recordings, their proposed performance will not accurately reflect the Deposit Copy.

3. I am Full Professor of Music and Director Emeritus of Music and the Performing Arts at New York University's Steinhardt School. For a full recitation of my education, professional experience, qualifications and background, I respectfully refer the Court to my curriculum vitae, annexed hereto as **Exhibit 1**. I have been engaged by Defendants in this action as a testifying expert; in short, I intend to testify at trial that no musicological evidence exists to support a claim that *Thinking Out Loud* copies from the *Let's Get It On* deposit copy registered with the U.S. Copyright Office ("Deposit Copy").

I. Defendants' Computer Audio Files Represent An Accurate Realization Of The Deposit Copy And Conform Precisely To What Is Notated In The Deposit Copy

4. I have reviewed the computer-generated audio files annexed as Exhibits 3-5 to the accompanying Declaration of Donald S. Zakarin (the "Computer Audio Files").

5. I understand that Defendants engaged Paul Geluso, a professional music recording engineer and the Director of the Music Technology Program at NYU's Steinhardt School, to create the Computer Audio Files.

6. The Computer Audio Files represent an accurate realization of the Deposit Copy and conform precisely to what is notated in the Deposit Copy. However, because the Deposit Copy does not notate any tempo at all and because any composition must be played at some tempo to be performed, the Computer Audio Files perform the Deposit Copy at a tempo.¹

¹ The Computer Audio Files utilize a tempo that is similar to the tempo of TOL, and thus make the Deposit Copy appear more similar to TOL than it actually is. I understand that Defendants also have reserved the right to offer Computer Audio Files of the Deposit Copy played at faster and slower tempos.

II. Plaintiffs' Proposed Performance Is Not Remotely Faithful To The Deposit Copy

7. I understand that Plaintiffs have no objection to Defendants offering the Computer Audio Files as evidence during their case at trial.

8. Nevertheless, I also understand that Plaintiffs still wish to offer their own purported performance (or performances) of the Deposit Copy. Specifically, I understand that Plaintiffs have furnished Defendants with two audio files – annexed as Exhibit 1 and Exhibit 2 to the accompanying Zakarin Declaration – that purport to represent two different performances of the Deposit Copy by a musician and vocalist, and that Plaintiffs intend to call upon that musician and vocalist to render a live purported performance of the Deposit Copy during trial supposedly consistent with one or both of those audio files (“Plaintiffs’ Proposed Performance”).

9. I have reviewed Exhibit 1 and Exhibit 2, which I understand correspond to what Plaintiffs have labeled as “Track 01” and “Track 02.” Track 01 and Track 02 do not remotely reflect an accurate realization of the Deposit Copy, they are different from each other, and they are misleading in important respects.

A. The Guitar Chords Are Erroneous And Misleading

10. Many of the guitar chords on Tracks 01 and 02 are played with the incorrect note as the lowest note of the chord, which imply low “bass” notes into the Deposit Copy (which are not notated in the Deposit Copy). This is not an accurate depiction of the Deposit Copy. In addition, many of the guitar chords are played with different notes than those actually expressed in the Deposit Copy.

11. In the first comparative transcription below, the top staff contains the notes of the chords that are notated in the Deposit Copy, and the bottom staff contains the notes that are played on the guitar in Track 01. A second comparative transcription of exactly the same notes

adds comments and missing notes in **red** and places red **X**'s over any of the notes played on the guitar in Track 01 that are different from the chords in the Deposit Copy.

**LGO Deposit Copy/ Track 01
Chords**

The image shows two staves of music in 4/4 time, key of B-flat major. The top staff, labeled 'LGO Deposit Copy', shows four chords: Eb (E-flat major), Gm (G minor), Ab (A-flat major), and Bb7 (B-flat dominant seventh). The bottom staff, labeled 'Track 01', shows the same four chords but with different voicings. The first chord is Eb/G, the second is Gm/D, the third is Ab, and the fourth is Bb. The notes in the Track 01 staff are marked with red X's to indicate discrepancies from the LGO Deposit Copy.

**LGO / Track 01
Chords with added comments and X's in red**

This image is a more detailed view of the same musical notation as above, but with red X's and red text annotations highlighting specific discrepancies. Red X's are placed over notes that differ from the LGO Deposit Copy. Red arrows point to these X's with the following comments: 'not the lowest note in LGO chord' (pointing to the G note in the first chord), 'missing note' (pointing to the missing A-flat note in the fourth chord), and '7' (pointing to the missing seventh note in the fourth chord). The annotations are in red text.

12. As shown above, the guitar chords as performed in Track 01 contain the following discrepancies as compared to the Deposit Copy:

- The bottom note of the first chord is “G” instead of “Eb”;
- The bottom note of the second chord is “D” instead of “G”;
- The fourth chord is “Bb” instead of “Bb7” due to the missing “a-flat” pitch; and

- As detailed further below in Section II.B., there are extraneous notes between the chords, implying rhythmic expression that is not reflected in the LGO Deposit Copy.

13. Similar discrepancies exist throughout the remainder of the Track 01 guitar performance. Significant discrepancies also exist with respect to Track 02.

14. In the second set of comparative transcriptions below, the top staff contains the notes of the chords that are notated in the Deposit Copy (transposed to the key of D major), and the bottom staff contains the notes that are played on the guitar in Track 02, which is recorded in the key of D major. A further comparative transcription of exactly the same notes follows and adds comments and missing notes in red and places red X's over any of the notes played on the guitar in Track 02 that are different from the chords in the Deposit Copy.

LGO Deposit Copy / Track 02
Chords

The first set of musical notation compares the LGO Deposit Copy (top staff) with the Track 02 performance (bottom staff). The top staff shows four chords: D, F#m, G, and A7. The bottom staff shows the corresponding guitar performance with various voicings: D5, D G/D, F#m/C#, G/D, A/E, and G/D.

LGO / Track 02
Chords with added comments and X's in red

The second set of musical notation compares the LGO Deposit Copy (top staff) with the Track 02 performance (bottom staff), highlighting discrepancies. The top staff shows the same four chords: D, F#m, G, and A7. The bottom staff shows the corresponding guitar performance with various voicings. Red X's and arrows indicate discrepancies: missing notes and notes not in the LGO chord.

15. As shown above, the guitar chords as performed in Track 02 contain the following discrepancies:

- The first chord is changed from a “D” chord to a “D5” chord due to the missing “f#” pitch;
- The bottom note of the “F#m” chord is “C#” instead of “F#”;
- The bottom note of the “G” chord in bar 3 is “D” instead of “G”;
- The last chord is “A” instead of “A7” due to the missing “g” pitch, and the bottom note is “E” instead of “A”;
- There are extraneous G/D chords on beat 3 of bar 1 and beat 4 of bar 4;
- There are other extraneous notes between the chords, which, as detailed below in Section II.B., implies rhythmic expression that is not reflected in the Deposit Copy.

16. Similar discrepancies exist throughout the remainder of the Track 02 guitar performance.

17. Moreover, when compared in the same key, the guitar chords performed in Track 01 do not even match the guitar chords performed in Track 02. In other words, Plaintiffs have offered two different versions of the guitar chords, and neither version is faithful to the Deposit Copy.

B. The Harmonic Rhythm Is Ad-Libbed, Inaccurate And Misleading

18. In addition to featuring inaccurate and misleading chords, Plaintiffs’ Proposed Performance (assuming it is identical to either Track 01 or Track 02) also features guitar strumming rhythmic patterns that are not notated in the Deposit Copy.

19. Indeed, the guitar rhythms in these Tracks are ad-libbed by the performer and not

remotely consistent with the rhythmic notation in the Deposit Copy.

C. The Vocal Melody Is Erroneous And Misleading

20. Compounding the flaws with the guitar chords and harmonic rhythm, the vocal melody in Tracks 01 and 02 is sung off-key with omitted notes, incorrect pitches and incorrect rhythmic durations. In addition, the two performances in the Tracks present two different interpretations of the vocal melody, and neither interpretation is accurate. To be clear, these differences between the notes that are sung and played in Track 01 and Track 02 are not due to the fact that each is recorded in a different key. Rather, Track 01 and Track 02 represent two different performances and interpretations of the melody in the Deposit Copy, and neither is remotely accurate. It is therefore unclear what Plaintiffs' Proposed Performance actually will be at trial, but if it is similar to the Tracks, it will be different from the Deposit Copy in significant, misleading ways.

21. In the first set of comparative transcriptions below, the top staff is the vocal melody that is notated in the Deposit Copy, and the bottom staff is the vocal melody as sung in Track 01. A second comparative transcription of exactly the same notes adds comments and missing notes in red and places red X's over any of the notes that are sung in Track 01 that are different from the vocal melody that is notated in the Deposit Copy.

**LGO Deposit Copy/ Track 01
Vocal Melody**

The image shows a musical score with two staves. The top staff is labeled 'LGO Deposit Copy' and the bottom staff is labeled 'Track 01'. Both staves are in 4/4 time and contain a series of notes. The Track 01 staff shows several notes that are different from the Deposit Copy staff, indicated by red X's and red text. The notes in the Track 01 staff are: G4, A4, B4, C5, D5, E5, F5, G5, A5, B5, C6, D6, E6, F6, G6, A6, B6, C7, D7, E7, F7, G7, A7, B7, C8, D8, E8, F8, G8, A8, B8, C9, D9, E9, F9, G9, A9, B9, C10, D10, E10, F10, G10, A10, B10, C11, D11, E11, F11, G11, A11, B11, C12, D12, E12, F12, G12, A12, B12, C13, D13, E13, F13, G13, A13, B13, C14, D14, E14, F14, G14, A14, B14, C15, D15, E15, F15, G15, A15, B15, C16, D16, E16, F16, G16, A16, B16, C17, D17, E17, F17, G17, A17, B17, C18, D18, E18, F18, G18, A18, B18, C19, D19, E19, F19, G19, A19, B19, C20, D20, E20, F20, G20, A20, B20, C21, D21, E21, F21, G21, A21, B21, C22, D22, E22, F22, G22, A22, B22, C23, D23, E23, F23, G23, A23, B23, C24, D24, E24, F24, G24, A24, B24, C25, D25, E25, F25, G25, A25, B25, C26, D26, E26, F26, G26, A26, B26, C27, D27, E27, F27, G27, A27, B27, C28, D28, E28, F28, G28, A28, B28, C29, D29, E29, F29, G29, A29, B29, C30, D30, E30, F30, G30, A30, B30, C31, D31, E31, F31, G31, A31, B31, C32, D32, E32, F32, G32, A32, B32, C33, D33, E33, F33, G33, A33, B33, C34, D34, E34, F34, G34, A34, B34, C35, D35, E35, F35, G35, A35, B35, C36, D36, E36, F36, G36, A36, B36, C37, D37, E37, F37, G37, A37, B37, C38, D38, E38, F38, G38, A38, B38, C39, D39, E39, F39, G39, A39, B39, C40, D40, E40, F40, G40, A40, B40, C41, D41, E41, F41, G41, A41, B41, C42, D42, E42, F42, G42, A42, B42, C43, D43, E43, F43, G43, A43, B43, C44, D44, E44, F44, G44, A44, B44, C45, D45, E45, F45, G45, A45, B45, C46, D46, E46, F46, G46, A46, B46, C47, D47, E47, F47, G47, A47, B47, C48, D48, E48, F48, G48, A48, B48, C49, D49, E49, F49, G49, A49, B49, C50, D50, E50, F50, G50, A50, B50, C51, D51, E51, F51, G51, A51, B51, C52, D52, E52, F52, G52, A52, B52, C53, D53, E53, F53, G53, A53, B53, C54, D54, E54, F54, G54, A54, B54, C55, D55, E55, F55, G55, A55, B55, C56, D56, E56, F56, G56, A56, B56, C57, D57, E57, F57, G57, A57, B57, C58, D58, E58, F58, G58, A58, B58, C59, D59, E59, F59, G59, A59, B59, C60, D60, E60, F60, G60, A60, B60, C61, D61, E61, F61, G61, 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B352, C353, D353, E353, F353, G353, A353, B353, C354, D354, E354, F354, G354, A354, B354, C355, D355, E355, F355, G355

LGO / Track 01
Vocal Melody with added comments and X's in red

The image shows two staves of musical notation. The top staff is labeled 'LGO Deposit Copy' and the bottom staff is labeled 'Track 01'. Both staves are in 4/4 time and contain a vocal melody. The melody consists of 14 notes. In the 'Track 01' staff, several notes are marked with red X's, and red text with arrows points to these notes, indicating 'missing note' and 'missing notes'.

22. As shown above, out of a total of 14 notes in the vocal melody in the Deposit Copy, only three notes have been sung correctly in Track 01 (while a fourth note is sung in the correct pitch and metric placement, the duration of the note is sung inaccurately).

23. Significant discrepancies also exist in Track 02.

24. In the second set of comparative transcriptions below, the top staff is the vocal melody that is notated in the Deposit Copy transposed to the key of D major, and the bottom staff is the vocal melody as sung in Track 02 in the key of D major. A further comparative transcription of exactly the same notes follows and adds comments and missing notes in red and places red X's over any of the notes that are sung in Track 02 that are different from the vocal melody that is notated in the Deposit Copy.

LGO / Track 02
Vocal Melody

The image shows two staves of musical notation. The top staff is labeled 'LGO Deposit Copy' and the bottom staff is labeled 'Track 02'. Both staves are in 4/4 time and contain a vocal melody. The melody consists of 14 notes. The top staff is transposed to the key of D major, and the bottom staff is the vocal melody as sung in Track 02 in the key of D major.

LGO / Track 02
Vocal Melody with added comments and X's in red

The image displays two musical staves. The top staff, labeled 'LGO Deposit Copy', shows a vocal melody in 4/4 time with a key signature of one sharp (F#). The melody consists of 14 notes. The bottom staff, labeled 'Track 02', shows the same melody but with several notes marked with red X's. Red arrows point to these X's with the labels 'missing note' and 'missing notes', indicating that these notes were not correctly reproduced in Track 02.

25. As shown above, out of a total of 14 notes in the vocal melody in the Deposit Copy, only three notes have been sung correctly in Track 02 (while 2 additional notes are sung in the correct pitch and metric placement, the durations of the 2 notes are sung inaccurately).

D. Summary

26. Neither Track 01 nor Track 02 is an accurate representation of the music notated in the Deposit Copy. Instead, each Track is misleading in significant ways. Furthermore, each Track contains a different version of the performance. More specifically:

- Many of the guitar chords do not match the chord symbols notated in the Deposit Copy and are thus an inaccurate reflection of the harmony;
- The guitar rhythms are ad-libbed by the performer and not notated in the Deposit Copy;
- The pitches of the vocal melody are often different from the pitches notated in the Deposit Copy;
- The melodic rhythm of the vocal melody is often different from the melodic rhythm notated in the Deposit Copy;

- When compared in the same key, the guitar chords performed in Track 01 do not match the guitar chords performed in Track 02;
- When compared in the same key, the vocal melody performed in Track 01 does not match the vocal melody performed in Track 02.

27. For all of these reasons, I respectfully submit that Plaintiffs should be precluded from introducing at trial their proposed performance of the *Let's Get It On* Deposit Copy as recorded on Audio Exhibit 1 and Audio Exhibit 2.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: February 24, 2023

A handwritten signature in black ink, appearing to read 'Law', with a large, loopy flourish extending from the end of the signature.

By: LAWRENCE FERRARA, Ph.D.